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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FORT PITT STEEL CASTING DIVISION, CONVAL-PENN, INC.,

Petitioner,

VS.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the factual circumstances of the instant case render inapplicable the rationale of *Nolde Brothers, Inc.* v. *Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO,* 430 U.S. 243 (1977), *rehearing denied* 430 U.S. 988 (1977) to the issue of whether grievances arising after contract termination and plant shutdown are arbitrable.

2. Whether, as pertains to Grievance No. 605, the additional factor of bargaining to impasse within the meaning of the National Labor Relations Act renders inapplicable to the instant case the rationale of *Nolde Brothers.*

PARTIES TO THE PROCEEDING

The Petitioner in this proceeding is: Fort Pitt Steel Casting Division, Conval-Penn, Inc.*

The Respondents are: United Steelworkers of America, AFL-CIO and James Garry, Quinto Delissio, Patrick McGhen and Ernest A. O'Black, on behalf of themselves and other similarly situated.

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* The parent company of Petitioner Conval-Penn, Inc. is Condec Corporation. Conval-Penn, Inc. has no subsidiaries or affiliates. In the court below, Conval Corporation and James P. Spresser, as Pension Board member, were also parties. Conval Corporation no longer exists; its parent company was Condec Corporation. James P. Spresser is no longer a party.

TABLE OF CONTENTS

PAGE

Questions Presented i

Parties To The Proceeding i

Opinions Below 1

Jurisdiction 2

Statement Of The Case 2

Reasons For Granting the Petition for Writ of Certiorari 4

I. The Factual Circumstances of the Instant Case Render Inapplicable the Rationale of *Nolde Brothers, Inc.* v. *Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO,* 430 U.S. 243 (1977), *rehearing denied,* 430 U.S. 988 (1977), to the Issue of Whether Grievances Arising After Contract Termination and Plant Shutdown are Arbitrable 4

A. The Union, by Exercising its Statutory Right to Strike Following the Contract Expiration, Relieved the Company of its Coterminous Duty to Arbitrate 4

B. The Parties have Evidenced a Sufficient Intent Not to Arbitrate Post-Contract Termination Grievances 12

II. The Rationale of *Nolde Brothers* is Additionally Inapplicable to Grievance No. 605 Because the Parties Bargained to Impasse Within the Meaning of the National Labor Relations Act Over the Subject Matter of this Grievance 15

III. This Case Presents a Critical Issue of Federal Law Which Should be Settled By the Court 18

PAGE

Conclusion 20

Appendix A

Decision of the Court of Appeals for the Third Circuit A-1

Appendix B

Decision of the District Court for the Western District of Pennsylvania B-1

Appendix C

Judgment of the Court of Appeals for the Third Circuit C-1

Appendix D

Order denying Petition for Rehearing from the Court of Appeals for the Third Circuit D-1

Appendix E

Applicable Contract Provisions E-1

TABLE OF AUTHORITIES

Cases

	PAGE
American Federation of Television and Radio Artists v. *NLRB*, 395 F.2d 622 (D.C. Cir. 1968)	16
Atkinson v. *Sinclair Refining Company*, 370 U.S. 238 (1962)	4
Bi-Rite Foods, Inc., 147 N.L.R.B. 59 (1964)	16
Boys Markets, Inc. v. *Retail Clerk's Union, Local 770*, 398 U.S. 235 (1970)	6, 8
Buffalo Forge Co. v. *United Steelworkers of America, AFL-CIO*, 428 U.S. 397 (1976)	8
Gateway Coal Company v. *United Mine Workers of America*, 414 U.S. 368 (1974)	4, 6, 12
Goya Foods, Inc., 238 N.L.R.B. 1465 (1978)	6
Hilton-Davis Chemical Company, 185 N.L.R.B. 241 (1970)	7
IAM, Local Lodge 2369 v. *Oxco Brush Div.*, 517 F.2d 239 (6th Cir. 1975)	11
Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. *Lucas Flour Company*, 369 U.S. 95 (1962)	5, 6
NLRB v. *Columbus Printing Pressmen Union No. 252*, 543 F.2d 1161 (5th Cir. 1976)	9
NLRB v. *Cone Mills Corporation*, 373 F.2d 595 (4th Cir. 1967)	16
NLRB v. *Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477 (1960)	5, 10
NLRB v. *Sheet Metal Workers, Local Union No. 38*, 575 F.2d 394 (2d Cir. 1978)	9
NLRB v. *Tex-Tan, Inc.*, 318 F.2d 472 (5th Cir. 1963)	16

PAGE

Nolde Brothers, Inc. v. *Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243 (1977) *rehearing denied*, 430 U.S. 988 (1977) ..... i, 4, 8, 9, 10, 11, 12, 14, 15, 16, 18, 19

Piano and Musical Instrument Workers, Local No. 2549 v. *W. W. Kimball Company*, 239 F.Supp. 523 (N.D. Ill. 1965) 11

Piano and Musical Instrument Workers, Local No. 2549 v. *W. W. Kimball Company*, 379 U.S. 357 (1964) *rev'g*, 333 F.2d 761 (7th Cir. 1964) 11

H. Prang Trucking Co. v. *Local 469, International Brotherhood of Teamsters*, 613 F.2d 1235 (3d Cir. 1980) 17

S & W Motor-Lines, Inc., 236 N.L.R.B. 938 (1978) 16

Textile Workers Union v. *Lincoln Mills of Alabama*, 353 U.S. 448 (1957) 6, 18

United Steelworkers of America v. *Fort Pitt Steel Casting Div.*, 598 F.2d 1273 (3d Cir. 1979) 13, 19

United Steelworkers of America v. *Warrior and Gulf Navigation Company*, 363 U.S. 574 (1960) 4, 7, 9, 16

John Wiley & Sons, Inc. v. *Livingston*, 376 U.S. 543 (1964) 4, 11

Statutes

28 U.S.C. § 1254(1) 2

29 U.S.C. § 151-68 5

29 U.S.C. § 158(a)(5) 17

29 U.S.C. § 158(d) 14

29 U.S.C. § 173(d) 11

29 U.S.C. § 185 3

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vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Fort Pitt Steel Casting Division, Conval-Penn, Inc., petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Third Circuit entered in this case on November 20, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 635 F.2d 1071 (3d Cir. 1980) and is reproduced herein as Appendix A. The Opinion of the U.S. District Court for the Western District of Pennsylvania, which was appealed to the Third Circuit Court of Appeals, is reported at 484 F. Supp. 1228 (W.D. Pa. 1980) and is reproduced herein as Appendix B.

JURISDICTION

The opinion and judgment of the Court of Appeals below were dated and entered on November 20, 1980. Petitioner's Petition for Rehearing was denied on December 17, 1980. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner, Fort Pitt Steel Casting ("Company"), manufactured and sold steel castings at its plant in McKeesport, Pennsylvania. The United Steelworkers of America, AFL-CIO ("Union") was the collective bargaining representative for the Company's production and maintenance workers. The Company and Union executed a three-year collective bargaining agreement on March 3, 1975 which expired on March 3, 1978.

Negotiations for a new contract began prior to the expiration date of the 1975 agreement after the Union provided proper contractual notice of its intent to terminate the contract. When no agreement was reached by March 3, 1978, the Union commenced a lawful strike in support of its bargaining position.

The strike lasted for almost nine months. During this strike the parties continued to negotiate. Both parties submitted several comprehensive proposals during the nine months of intensive negotiations. On November 30, 1978, when the Union refused to accept the Company's "final offer," it permanently closed the McKeesport facility.

On January 25, 1979 and January 29, 1979, the Union filed a series of grievances involving issues that arose after the expiration of the contract and the shutdown of the plant. The Company settled some of the grievances, agreed that one was arbitrable, but contended that the six grievances that form the basis of the instant case were not arbitrable under the 1975 agreement.

The six grievances addressed issues involving whether the Pension Plan permitted certain deductions from disability and age pension payments, whether employees retiring after March 3, 1978 should receive life insurance coverage, whether the Company could offset insurance premiums owed the Company from accrued vacation pay, whether the employees terminated by the plant shutdown were owed severance pay and whether the Company was liable for supplemental unemployment compensation benefits (SUB) to the employees terminated after November 30, 1978.

On September 6, 1979, the Union filed suit in the United States District Court for the Western District of Pennsylvania to compel arbitration under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976). This suit was delayed pending settlement negotiations, which broke down in November, 1979. The Company requested that the District Court permit discovery for the limited purpose of resolving the issue of arbitrability. In response, the Union filed a motion for summary judgment. The Company filed a cross-motion for summary judgment on five of the six grievances. With respect to the grievances over severance pay, it filed a response that sufficient issues of material fact had been raised to preclude summary judgment. The District Court granted the Union's motion for summary judgment, holding that all six grievances filed by the Union were arbitrable, and it ordered the Company to comply with the grievance and arbitration provisions of the 1975 agreement.

The Company appealed the District Court's order and on November 20, 1980, the Third Circuit affirmed the District Court's order. On December 4, 1980, the Company petitioned for a rehearing which was denied on December 17, 1980.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

I. THE FACTUAL CIRCUMSTANCES OF THE INSTANT CASE RENDER INAPPLICABLE THE RATIONALE OF *NOLDE BROTHERS, INC., V. LOCAL NO. 358, BAKERY & CONFECTIONERY WORKERS UNION, AFL-CIO*, 430 U.S. 243 (1977), *rehearing denied*, 430 U.S. 988 (1977) TO THE ISSUE OF WHETHER GRIEVANCES ARISING AFTER CONTRACT TERMINATION AND PLANT SHUTDOWN ARE ARBITRABLE

A. The Union, By Exercising Its Statutory Right To Strike Following The Contract Expiration, Relieved The Company Of Its Coterminous Duty To Arbitrate

The Company submits that the rationale of *Nolde Brothers, Inc.* v. *Local No. 358, Bakery & Confectionery Workers Union*, AFL-CIO, 430 U.S. 243 (1977), *rehearing denied*, 430 U.S. 988 (1977) is inapplicable to the instant case because the Union, contrary to the union in *Nolde*, struck following contract termination. Thus, the Union relieved the Company of the duty to arbitrate.

It is well established by this Court that the obligation to arbitrate is a voluntary procedure founded solely upon a contract and does not arise by operation of law. In *Gateway Coal Company* v. *United Mine Workers of America*, 414 U.S. 368 (1974), the Court stated:

> No obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so.

414 U.S. at 374; *See also, United Steelworkers* v. *Warrior and Gulf Navigation Company*, 363 U.S. 574, 582 (1960); *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 547-48 (1964); *Atkinson* v. *Sinclair Refining Company*, 370 U.S. 238, 241 (1962).

Congress has declared through the National Labor Relations Act [1] that the national labor policy also favors collective bargaining as a means to resolve disputes. Section 151 states in part:

> It is hereby declared to be the policy of the United States to . . . [encourage] the practice and procedure of collective bargaining . . . for the purpose of negotiating the terms and conditions of [workers'] employment or other mutual aid or protection.

While recognizing the national labor policy favoring collective bargaining, this Court has nevertheless made it clear that such labor policy must also accommodate a party's right to exercise economic force in collective bargaining. In *NLRB* v. *Insurance Agents' International Union, AFL-CIO,* 361 U.S. 477 (1960), this Court stated:

> But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between the parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exists side by side. One writer recognizes this by describing economic force as "a prime motive power for agreements in free collective bargaining."

361 U.S. at 489 (footnote omitted).

Arbitration, as the peaceful means for resolving disputes, is the "substitute for economic warfare" during the term of a collective bargaining agreement. *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Lucas Flour Company,* 369 U.S. 95, 105 (1962). Therefore, when a union opts for economic warfare by engaging in a strike following contract termination, an employer should not then be bound to arbitrate. As substitutes for one another, economic warfare and arbitration are mutually exclusive.

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[1] 29 U.S.C. §§ 151-68 (1976).

Indeed, while it is well established that the arbitration process is the preferred method for resolving disputes in lieu of resort by a union to economic force via a strike, an employer's agreement to final and binding arbitration is universally regarded by the courts as the *quid pro quo* for a union's commitment not to strike. In this Court's landmark decision in *Textile Workers Union* v. *Lincoln Mills of Alabama,* 353 U.S. 448 (1957), this Court stated:

> Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike.

353 U.S. at 455; *See also Gateway Coal Company, supra,* 414 U.S. at 382; *Boys Markets, Inc.* v. *Retail Clerk's Union, Local 770,* 398 U.S. 235, 248 (1970). So critical is this *quid pro quo* relationship that this Court has gone so far as to *imply* the existence of a no-strike clause in an existing contract over disputes subject to an agreement to arbitrate where the parties had not specifically included a no-strike clause, *Lucas Flour, supra.*

Additionally, the National Labor Relations Board, the agency charged with monitoring fulfillment of the duty to bargain collectively in good faith, has determined in the context of a mutual duty to bargain that the duty to arbitrate is coterminous with the obligation not to strike:

> In addition, we find that the no-strike clause in the contract herein has coterminous application with said duty to arbitrate . . . so should the duty not to strike not live on to the extent of the duty to arbitrate over issues created by or arising out of the expired agreement.

Goya Foods, Inc., 238 N.L.R.B. 1465, 1467 (1978). In *Goya Foods,* the Board also stated:

> Furthermore, it would indeed be anomalous if an employer who would be contractually bound to arbitrate a certain dispute after contract expiration could still

> be subjected to economic pressure that would be protected.

238 N.L.R.B. at 1467.

Previously, the Board in *Hilton-Davis Chemical Company,* 185 N.L.R.B. 241 (1970) permitted an employer to refuse to arbitrate grievances during a hiatus period between a contract's termination and its renewal stating:

> They have further agreed, where arbitration has been accepted, voluntarily and mutually to surrender the use of their respective economic weapons in favor of third party determination of unresolved issues. The consequent reduction of industrial strife is widely celebrated and has led to a declared national policy encouraging arbitration, Section 203(d), Labor Management Relations Act, 29 U.S.C., Section 173(d); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960). But we must not be induced by that policy or its benefits to overlook that arbitration is, at bottom, a consensual surrender of the economic power which the parties are otherwise free to utilize. Absent mutual consent, the parties revert to the statutory scheme of "free" collective bargaining, wherein each party must attempt in good faith to reach agreement, but is under no statutory mandate to reach agreement or to forfeit its right to utilize its economic power if no agreement can be achieved.

185 N.L.R.B. at 242.

The end objective of any industrial enterprise is to maintain continued utilization of its economic capital without interruption. Thus, arbitration is favored as part of our national labor policy "For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production. . . ." *Warrior and Gulf, supra,* 363 U.S. at 582. Thus, arbitration is favored during the term of an agreement when labor sta-

bility exists pursuant to a collective bargaining agreement. When a union, however, sets in motion the termination of that agreement to gain new benefits and exercises its strongest economic weapon, a strike, it lawfully interrupts the continued flow of production. Its selection of this forum to achieve its collective bargaining objectives, therefore, must necessarily relieve the employer of the coterminous duty to arbitrate.

The Third Circuit, while recognizing the "substantial argument" raised by the Company on this point chose, nevertheless, to avoid resolution of this "difficult question" of whether the arbitration clause survives contract termination when a union engages in a lawful economic strike. 635 F.2d at 1076, 1078. Characterizing the issue as one of reconciling the rationale of *Nolde* with those cases that hold that a federal court may enjoin a strike on the condition that the employer agreed to arbitrate the grievances in question, the court erected the artificial assumption that the no-strike clause remained in effect after March 3, 1978. With this underlying premise for its opinion intact, the court analyzed the Company's argument in light of *Boys Markets, supra,* and *Buffalo Forge Co.* v. *United Steelworkers of America, AFL-CIO,* 428 U.S. 397 (1976).[2]

The obvious fallacy of this analysis is that the no-strike clause in question did *not* remain in effect after March 3, 1978.[3] At that time, the Union engaged in a nine-month strike which terminated with the closing of the plant in November, 1978. The Third Circuit's analysis fails to come to grips with the broader concept that arbitration, as "part

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[2] 635 F.2d at 1076-78.

[3] The Union did not urge upon the court below the *Boys Markets —Buffalo Forge* analysis relied upon by the court, but rather relied chiefly on the rationale of the *Nolde* decision.

and parcel of the collective bargaining process itself,"[4] is the alternative to the exercise of economic force during the term of a contract:

> The grievance procedure is, in other words, a part of the *continuous* collective bargaining process. It, rather than a strike, is the terminal point of a disagreement.

Warrior and Gulf, supra, 363 U.S. at 581 (emphasis added).

As part of the *continuous* collective bargaining process, the parties reap the benefit of labor peace and stability during a contract term with arbitration serving as the dispute resolution mechanism. Following the contract expiration without prior agreement on a new contract, the parties continue to engage in the collective bargaining process but with an "obvious change in the relationship." *Nolde,* 430 U.S. at 254. As a result, the method for resolving outstanding issues is now set in a different cast. The parties may continue to bargain without an interruption of production[5] or either party may invoke the use of economic force to gain acceptance of its demands. When the forum of economic force is chosen by one party, the "substitution" for a peaceful resolution of disputes is complete. Thus, the collective bargaining process continues but that "part and

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[4] *Warrior and Gulf, supra,* 363 U.S. at 578.

[5] By comparison, arbitration is frequently used to resolve conflicting collective bargaining demands following contract termination as an alternative to the exercise of economic power. But such arbitration, known as "interest" arbitration is purely a consensual matter and there exists no presumption favoring this dispute resolution mechanism. Indeed, it is illegal to strike to obtain arbitration as the method to resolve such conflicting collective bargaining demands. *NLRB* v. *Sheet Metal Workers, Local Union No. 38,* 575 F.2d 394, 398 (2d Cir. 1978); *NLRB* v. *Columbus Printing Pressmen Union No. 252,* 543 F.2d 1161, 1170-71 (5th Cir. 1976).

parcel" of the overall process, arbitration, is no longer extant. The necessary *quid pro quo* has been extinguished.

The collective bargaining process transcends a contract termination. Parties are required by law to continue to bargain following contract termination unless the collective bargaining relationship ends due to, for example, plant shutdown as occurred here. Thus, the essential point missed by the court below is that since a lawful economic strike following contract termination is part of the collective bargaining process[6] as is arbitration, the *quid pro quo* relationship should not turn on whether the strike was in pursuit of lawful objectives. The collective bargaining process embraces both forums. When a union chooses the forum of economic force, *the quid pro quo* for arbitration has been relinquished and no obligation to arbitrate should be imposed.

This court in *Nolde* was not faced with a situation where a strike occurred following the contract expiration and before the plant was shut down. Although the union was free to strike following the contract's expiration on August 27, 1973, it chose not to do so and continued to negotiate. When the employer was faced with a threatened strike following the union's rejection of the employer's latest proposal, the plant was shut down. Thus, the Court faced solely the issue of whether the employer was required to arbitrate a contractual dispute which arose following the contract's expiration, but without a strike.[7]

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[6] *NLRB* v. *Insurance Agents' International Union, AFL-CIO, supra,* 361 U.S. at 489.

[7] Accordingly, the dissent, while noting the *quid pro quo* argument advanced by the Company herein, relied upon the contract's expiration and the shutdown of the plant in support of its view that the duty to arbitrate expired. 430 U.S. at 256-258.

The Court in *Nolde* relied principally on its prior opinion in *John Wiley, supra,* where admittedly the initial demand for arbitration was made prior to the contract's expiration. 430 U.S. at 252. The Court sought to distinguish that fact situation from the post-contract termination demand for arbitration presented in *Nolde* on the basis of its prior decision in *Piano and Musical Instrument Workers Local No. 2549* v. *W. W. Kimball Company,* 379 U.S. 357 (1964), *rev'g,* 333 F.2d 761 (7th Cir. 1964). *Piano Workers,* however, does not adequately answer the effect of a contract's termination on the duty to arbitrate. In *Piano Workers,* the contract was in effect when the old plant shut down, the event which triggered the union's claim for recall rights at the new plant. Thus, it can be fairly said, as did the dissent in *Nolde,* that in *Piano Workers* a "dispute" within the meaning of the applicable grievance and arbitration provisions arose before the contract expired, 430 U.S. at 257-58.[8]

Accordingly, it is uncertain whether *Piano Workers* has, implicitly or explicitly, disposed of the distinction between the arbitrability of a contract claim which arose before or after the contract expired.[9] What is clear is that the majority in *Nolde* was not required to decide what effect a post-contract termination strike had upon the employer's duty to arbitrate grievances which arose after the expiration of

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[8] The union in *Piano and Musical Instrument Workers, Local No. 2549* v. *W. W. Kimball Company* agreed with this view, 239 F.Supp. 523, 524 (N.D. Ill. 1965) (quoting, on remand, the union's petition for certiorari). *Accord, IAM Local Lodge 2369* v. *Oxco Brush Div.,* 517 F.2d 239, 243 (6th Cir. 1975).

[9] The majority's reliance on Section 203(d) of the Act (29 U.S.C. § 173(d)) is misplaced. 430 U.S. at 254. Congress expressly provided in Section 203(d) that the agreement subject to the agreed-upon dispute adjustment method must be an "existing" agreement. Here no agreement existed when the subject grievances arose.

the contract and after the plant was shut down. Thus, the rationale of *Nolde* is inapplicable to the instant case.

B. The Parties Have Evidenced A Sufficient Intent Not To Arbitrate Post-Contract Termination Grievances

As noted above, this Court has consistently recognized that arbitration is a voluntary procedure arising out of a contract and does not arise solely by operation of law. *Gateway Coal Company, supra,* 414 U.S. at 374. Therefore, it is necessary to find a contractual basis upon which to establish a requirement that the Company arbitrate the grievances at issue herein.

To date, the Court has approached this question in the form of a negative burden of proof, *i.e.,* unless it can be said that the parties intended to exclude a matter from arbitration, it will be presumed that arbitration was intended. In *Nolde,* the Court articulated this principle as follows:

> The contract's silence, of course, does not establish the parties' intent to resolve post-termination grievances by arbitration. But in the absence of *some contrary indication,* there are strong reasons to conclude that the parties did not intend their arbitration duties to terminate automatically with the contract.

430 U.S. at 253 (emphasis added).[10]

It is submitted that in the instant case, the parties have indicated the requisite "contrary indication," albeit by negative implication, that they intended certain contract

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[10] Later, at 430 U.S. at 255, the court stated that the presumption favoring arbitrability must be "negated expressly or by clear implication." To what extent this test differs, if at all, from the one set forth above is unclear. The Third Circuit, without commenting on Paragraph 140 (discussed, *infra*), found no express or clear implication in the contract to exclude the grievances at issue from arbitration. 635 F.2d at 1076.

clauses to survive the contract expiration to the exclusion of all others. For example, Paragraph 140 of the agreement (Appendix E) is a clause which by its express terms did not come into existence until the rest of the contract, in fact, expired. As the Third Circuit noted in the related case of *United Steelworkers of America* v. *Fort Pitt Steel Casting Div.*, 598 F.2d 1273 (3d Cir. 1979) (*Fort Pitt I*):

> Here, however, paragraph 140 of the 1975 Agreement was still operative. That paragraph did not even take effect until *the rest of the 1975 Agreement had expired* and the labor dispute had begun, and did not lapse, by its terms, until the end of the dispute.

598 F.2d at 1281 (emphasis added). Thus, the parties demonstrated an ability to negotiate a clause, which by its express terms, survived the contract expiration. That they chose not to do so with respect to the remainder of the contract, including the arbitration provisions, is clear evidence that those provisions were not intended to survive the agreement's termination.

Similarly, Paragraph 142 provided that grievances filed *before* the expiration of the then applicable 1972 agreement would be processed under the 1972 or 1975 agreements depending upon the sequence of the grievance during the transition from one contract to another (Appendix E). The essential point for purposes of this Petition is that Paragraph 142 also evidences a clear intent that only grievances that were filed or arose before the contract expired are subject to the grievance and arbitration procedure.[11] Since the parties never renewed Paragraph 142,

[11] The Third Circuit conceded that Paragraph 142 provided "some indication of the parties' intent" but was not the "clear implication" required to rebut the presumption of arbitrability. 635 F.2d at 1076.

it must follow that the grievances at issue here which arose and were filed after the contract's expiration are not subject to arbitration.[12]

The presumption favoring arbitrability has been based on the ill-defined thought that, despite the practicalities of the collective bargaining process, parties to that process intend in all instances to embrace the national labor policy favoring arbitration. As a practical matter, however, it is fair to say that parties to a collective bargaining agreement rarely, if ever, even address the subject of what provisions will remain arbitrable following the termination of a contract. This is true because a collective bargaining agreement is the embodiment in writing[13] of a relationship that, by law, remains continuing in nature absent intervening circumstances that may legally terminate that relationship, *e.g.*, decertification, plant shutdown, etc. That relationship is ongoing and the collective bargaining agreement resulting from that relationship is ongoing. Although a collective bargaining agreement may have periodic points in time when it "terminates," these occurrences do not change the fundamental continuing nature of the relationship. Rather, they merely provide an opportunity for either side to update provisions to reflect the current status of their relationship and to make appropriate adjustments (*e.g.*, wage and benefit improvements).

Thus, a collective bargaining agreement differs markedly from a commercial contract which provides for the performance of specific services over a finite time period for a fixed sum. In this situation, the relationship ends upon performance of the contract by both parties. Bargained and drafted in the context of a continuing relationship

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[12] The *Nolde* contract apparently contained no clauses similar to Paragraphs 140 and 142.

[13] Required by 29 U.S.C. § 158(d).

where the goal of the parties is to maintain continuity and a renewal of the agreement without interruption of production, a collective bargaining agreement would not be expected to contain explicit provisions relating to exclusions from arbitration upon termination. Such proposals would only raise fear and suspicion between the parties and endanger the harmonious continuation of the relationship. Instead, implicit references are contained in a contract to reflect the parties' intent that only certain provisions survive a contract expiration to the exclusion of all others, including arbitration.

II. THE RATIONALE OF *NOLDE BROTHERS* IS ADDITIONALLY INAPPLICABLE TO GRIEVANCE NO. 605 BECAUSE THE PARTIES BARGAINED TO IMPASSE WITHIN THE MEANING OF THE NATIONAL LABOR RELATIONS ACT OVER THE SUBJECT MATTER OF THIS GRIEVANCE

Grievance No. 605 alleges that when the plant was closed on November 30, 1978 after some nine months of unsuccessful negotiations following the contract expiration, severance pay became due and owing the former employees in accordance with the applicable provisions of the expired agreement. As with the other grievances that arose following the shutdown of the plant, the Company responded that this grievance was not arbitrable. In addition to the reasons set forth in Part I above, the Company submits that Grievance No. 605 is not arbitrable because the resolution of the merits of this claim involves a consideration of the doctrine of impasse within the meaning of the National Labor Relations Act. As such, the normal expertise of an arbitrator does not encompass an analysis of the legal principles raised by this matter.[14]

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[14] The Third Circuit below simply held that an arbitrator should determine the issue on the merits including the facts relevant to the impasse issue. 635 F.2d at 1079.

In discussing the presumption favoring arbitrability, the court in *Nolde* referenced as one of the principal underpinnings of the presumption, the "special role of the arbitrator in the employer-employee relationship." 430 U.S. at 253. In *Warrior and Gulf, supra,* the court defined this special role:

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment.

363 U.S. at 581-82.

Resolution of the merits of Grievance No. 605 requires, among other things, an analysis of Petitioner's contention that during the collective bargaining that followed the contract termination but before the plant shutdown, the parties bargained to impasse over the elimination of the severance pay provision. As such, an arbitrator would be required to analyze the doctrine of impasse as it has been developed by the NLRB and the courts under the National Labor Relations Act. *American Federation of Television and Radio Artists* v. *NLRB,* 395 F.2d 622 (D.C. Cir. 1968); *NLRB* v. *Cone Mills,* 373 F.2d 595 (4th Cir. 1967); *NLRB* v. *Tex-Tan, Inc.,* 318 F.2d 472 (5th Cir. 1963); *S & W Motor-Lines, Inc.,* 236 N.L.R.B. 938 (1978); *Bi-Rite Foods, Inc.,* 147 N.L.R.B. 59 (1964).

Such analysis of the doctrine of impasse does not involve the "common law of the shop" but rather difficult legal concepts that are clearly beyond the expertise of an arbitrator. Developed by the Board and the courts in the context of a refusal to bargain within the meaning of the National

Labor Relations Act,[15] this doctrine is rarely, if ever, present in the arbitral forum which deals with contract interpretation issues that bring into play concepts of industrial common law within the expertise of an arbitrator.

Resolution of the impasse question in favor of the Company would necessarily eliminate the substantive issue raised by Grievance No. 605, *i.e.*, whether the severance pay was due and owing at the time the plant shut down. The Third Circuit was recently confronted with a conceptually similar situation and held that a court, rather than an arbitrator, must decide whether an underlying basis exists for even considering the merits of an arbitration claim. In *H. Prang Trucking Co.* v. *Local 469, International Brotherhood of Teamsters,* 613 F.2d 1235 (3d Cir. 1980), the court faced the issue of whether a labor agreement should be reformed or rescinded due to a mistake of fact which, in turn, would determine whether there existed an arbitral dispute concerning the employer's obligation to make contributions to a union's welfare and pension fund.

While the Third Circuit conceded that the concepts of recension and reformation are "not unknown in the field of labor contracts," 613 F.2d at 1239, the court, nevertheless, held that the resolution of this underlying issue which would determine whether any substantive question remained for an arbitrator, was for a court to decide:

> We hold only that when a party in an action to enjoin arbitration properly raises issues the determination of which may preclude arbitration of the underlying dispute, the trial court must consider those issues, rule upon them, and support its conclusions with adequate findings of fact.

613 F.2d at 1239.

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[15] 29 U.S.C. § 158(a)(5) (1976).

By the same token, resolution of the impasse issue in the Company's favor would preclude arbitration of the underlying dispute as there would then exist no severance pay provision for an arbitrator to interpret. As such, resolution of this core issue which may preclude arbitration and which raises complex legal issues, is for a court to decide.

III. THIS CASE PRESENTS A CRITICAL ISSUE OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THE COURT

From this Court's recognition of the need to fashion a federal labor law policy in *Lincoln Mills, supra,* the federal courts have favored arbitrability as a substitute for economic warfare. Although *Nolde* extended the presumption of arbitrability to grievances filed after the expiration of collective bargaining agreements and plant shutdown, it left unanswered questions involving the relationship between arbitration, collective bargaining after the expiration of a contract, the commencement of an economic strike, and plant shutdown.

The dissent in *Nolde* was of the view that to extend the duty to arbitrate the severance pay grievance that arose after contract expiration and as a result of the plant shutdown was to stretch the presumption favoring arbitration too far. Noting that the favor arbitration has enjoyed in is premised upon a "web of assumptions about the continuing nature of the labor management relationship," the dissent found such rationale wholly inapplicable where the closing of the plant "necessarily meant that there was no

continuing relationship to protect or preserve." 430 U.S. at 256.[16]

The instant case clearly demonstrates the critical dilemma faced by unions and employers when a federal court attemps to analyze the presumption of arbitrability under *Nolde* after nine months of a strike, negotiations, and a plant shutdown. The court below failed to grasp and analyze the events which followed the expiration of the contract (*i.e.*, a strike, bargaining to impasse and plant shutdown) and the effect of these events on the Company's obligation to arbitrate in the overall context of the parties' duty to bargain collectively.

Instead of analyzing the effect of each of these critical factors, the court below relied upon case law developed on the basis of existing agreements. Yet, the presumption of arbitrability should not live forever. To compel arbitration in light of all the events which occurred subsequent to the contract termination, removes the balance between the parties that Congress sought to achieve in collective bargaining.

The facts of the instant case provide a sound basis for defining the limits on that presumption of arbitration. To let the decision stand creates too much uncertainty and destroys the congressional objectives of free collective bargaining sought under the National Labor Relations Act.

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[16] Significantly, the Third Circuit in *United Steelworkers* v. *Fort Pitt Steel Casting Division (Fort Pitt I), supra,* has expressed a similar view. There the District Court held that whether the Company's obligations to continue insurance premium payments under Paragraph 140 of the agreement terminated upon its shutdown of the plant was an arbitrable issue. The court disagreed holding that such issue is for the court, in essence, because the arbitrable process no longer needed protection once the plant had been shut down. 598 F.2d at 1283.

CONCLUSION

For the foregoing reasons, Petitioner, Fort Pitt Steel Casting Division, prays that this Court issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX A

A-1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1431

UNITED STEELWORKERS OF AMERICA, AFL-CIO; and JAMES GARRY, QUINTO DELISSIO, PATRICK MCGHEN, and ERNEST A. OBLACK, on behalf of themselves and others similarly situated

v.

FORT PITT STEEL CASTING DIVISION-CONVAL-PENN INC., DIVISION OF CONVAL CORPORATION and JAMES P. SPRESSER as Pension Board Member and Agent for Pension Board of Fort Pitt Steel Casting, Division-Conval-Penn Inc., Pension Plan for Members of Local 1406 United Steelworkers of America

FORT PITT STEEL CASTING, DIVISION OF CONVAL-PENN, INC., DIVISION OF CONVAL CORPORATION,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civ. No. 79-1254)

Argued October 9, 1980

Before: SEITZ, *Chief Judge*, HIGGINBOTHAM, *Circuit Judge*, and MEANOR, *District Judge**

(Filed November 20, 1980)

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* Honorable H. Curtis Meanor, United States District Judge for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

SEITZ, *Chief Judge*.

Fort Pitt Steel Casting (Fort Pitt), appeals from an order of the district court granting summary judgment in favor of the United Steelworkers of America (the Union), and ordering Fort Pitt to arbitrate six grievances filed by the Union.

I.

We commence with an undisputed factual narration. Fort Pitt manufactured and sold steel castings at its plant in McKeesport, Pennsylvania. The Union was the collective bargaining representative for Fort Pitt's production, maintenance and clerical workers. Fort Pitt and the Union executed a three-year collective bargaining

agreement on March 3, 1975 (the 1975 Agreement). The 1975 Agreement contains a broad arbitration clause, which provides for the arbitration of "any request or complaint." It also contains a similarly broad no-strike and no-lockout clause, which suspends the duty to arbitrate the grievance in question or other grievances during a strike or lockout. The 1975 Agreement was to expire on March 3, 1978.

Negotiations for a new contract began prior to the expiration date of the 1975 Agreement. When no agreement was reached by March 3, 1978, the Union commenced a lawful strike in support of its bargaining position. Paragraph 144 of the 1975 Agreement provides that either party can strike or lockout in support of its position if an agreement on new contract terms has not been reached within sixty days after one party gave notice of its desire to terminate the contract and to negotiate over certain issues.[1]

The strike lasted for almost nine months. During this strike the parties continued to negotiate until November 30, 1978. On that date, when the Union refused to accept Fort Pitt's "final offer," Fort Pitt permanently closed the McKeesport facility. The parties then entered into negotiations regarding the effects of the shutdown. When they could not agree to a shutdown settlement, negotiations terminated.

On January 5, 1979 and January 29, 1979, the Union filed a series of grievances. These grievances arose when Fort Pitt, at the time it closed the plant, refused to honor certain obligations that the Union contended were due the employees under the 1975 Agree-

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1. For the history of this long labor dispute, see *United Steelworkers of America v. Fort Pitt Steel Casting*, 598 F.2d 1273 (3d Cir. 1979) (*Fort Pitt I*). In *Fort Pitt I*, we characterized the Union's strike as a "lawful work stoppage." *Id.* at 1276. Fort Pitt does not contest this characterization. Moreover, Fort Pitt has not claimed that the Union failed to comply with ¶ 144.

ment. Fort Pitt settled some of the grievances, agreed that one was arbitrable, but contended that the six grievances that form the basis of this suit were not arbitrable under the 1975 Agreement. These six grievances address: (1) The failure to pay severance pay to the employees who were terminated when the plant was closed; (2) the refusal to pay vacation pay to the employees for calendar year 1978; (3) the cancellation of life insurance coverage for all retirees; (4) the improper deduction of social security benefits from pension benefits of retirees; (5) the cancellation or termination of life insurance coverage under the Pension Plan for persons retiring after March 3, 1978; and (6) the refusal to pay Supplemental Unemployment Compensation Benefits (SUB) to the terminated employees or to distribute the SUB fund when operations ceased.

On September 6, 1979, the Union filed suit in the United States District Court for the Western District of Pennsylvania to compel arbitration under section 301 of the Labor Management Relations Act, 29 U.S.C. §185 (1976). This suit was delayed pending settlement negotiations, which broke down in November 1979. Fort Pitt requested that the district court permit discovery for the limited purpose of resolving the issue of arbitrability. In response, the Union filed a motion for summary judgment. Fort Pitt filed a cross-motion for summary judgment on five of the six grievances. With respect to the grievance over severance pay, it filed a response that sufficient issues of material fact had been raised to preclude summary judgment. The district court granted the Union's motion for summary judgment, holding that all six grievances filed by the Union were arbitrable, and it ordered Fort Pitt to comply with the grievance and arbitration provisions of the 1975 Agreement.

Fort Pitt attacks the district court's decision on two grounds. First, it argues that *Nolde Brothers, Inc. v. Local 358, Bakery & Confectionery Workers*, 430 U.S. 243 (1977), does not control the disposition of this case be-

cause: (A) the 1975 Agreement, by clear implication, provides that the arbitration clause shall not survive termination; (B) the Union engaged in a prolonged strike after the 1975 Agreement expired; and (C) the parties bargained to impasse over the severance-pay provision. Second, Fort Pitt argues that even if the arbitration clause survives termination of the 1975 Agreement, each of the six grievances filed by the Union is not arbitrable under the 1975 Agreement.

II.

In *Nolde*, the Supreme Court held that the arbitration clause of a collective bargaining agreement survives contract termination unless the parties indicate a contrary intent, either expressly or by clear implication. *See* 430 U.S. at 255. Thus, the parties must arbitrate claims that arise under the contract, but are based on events occurring after its termination. In *Nolde*, the parties had begun negotiations in May 1973 and the contract expired on August 27, 1973. Negotiations for a new contract continued until August 31, 1973, when the company permanently closed its plant in response to the union's threatened strike.

In holding that the arbitration clause survived contract termination, the *Nolde* Court emphasized the well-established labor policy favoring arbitration as a means of settling labor disputes. The Court noted that although contract termination changes the relationship between the union and the employer, many of the considerations underlying a decision to resolve disputes by arbitration are unaffected by contract termination. For example, the Court found that:

> The contracting parties' *confidence in the arbitration process* and an *arbitrator's presumed special competence* in matters concerning bargaining agreements *does not terminate with the contract.* Nor would their interest in obtaining a *prompt and*

> *inexpensive resolution* of their disputes by an expert tribunal. Hence, there is little reason to construe this contract to mean that the parties intended their contractual duty to submit grievances and claims arising under the contract to terminate immediately on the termination of the contract; *the alternative remedy of a lawsuit is the very remedy the arbitration clause was designed to avoid.*

Id. at 254 (emphasis added). With this reasoning in mind, we will examine Fort Pitt's arguments that *Nolde* does not control the disposition of this case.

A.

Fort Pitt points to three provisions of the 1975 Agreement as evidence that the parties did not intend that the arbitration clause survive contract termination. First, it argues that the duty to arbitrate is limited to the life of the agreement because the term "employee" is defined in paragraph nine of the 1975 Agreement as production, maintenance and clerical workers for which "the Union is, or may be *during the life of this Agreement*, certified" as the exclusive collective-bargaining representative. (Emphasis added). This language, however, does not constitute the clear indication of intent that the *Nolde* Court contemplated as sufficient to negate the presumption of arbitrability. Instead, it merely provides that the 1975 Agreement applies to all employees who work in units for which the Union is certified during the life of the Agreement. It says nothing about the duration of the duties of the parties to the 1975 Agreement, including the duty to arbitrate.

Second, Fort Pitt argues that the arbitration clause cannot survive plant shutdown because only *employees* have the right to file grievances under paragraph 88(2), and the individuals who filed grievances in this case were no longer employees. However, in *Nolde*, the arbitration clause provided that "[a]ll grievances shall be

first taken up between the Plant Management and the Shop Steward." The Court did not find it significant that there was no shop steward after the shutdown of the plant. Moreover, as we stated in *United Steelworkers v. Canron*, 580 F.2d 77, 82 (3d Cir. 1978), "[i]n determining . . . the arbitrability of the dispute—the 'bottom line' is not calculated by the status of the grievants but by the nature of the duties and obligations of the parties under the contract." Therefore, the fact that the 1975 Agreement limits the right to file grievances to "employees" does not indicate that the parties intended to preclude arbitration over the issues in this case.

Third, Fort Pitt argues that paragraph 142, which provides that any grievance that arose *prior* to March 3, 1975 will be subject to the grievance and arbitration procedures of the 1975 Agreement, indicates by negative implication that the parties intended that grievances arising after the March 3, 1978 expiration date would not be subject to arbitration under the 1975 Agreement. We are not convinced that this provision provides any indication of the parties' intent as to the status of the arbitration clause during the period between the expiration of the 1975 Agreement and the institution of a new collective bargaining agreement. Even if it can be said to provide some indication of the parties' intent, it is not the "clear implication" that the *Nolde* Court considered sufficient to rebut the presumption of arbitrability. Therefore, we conclude that the parties to the 1975 Agreement did not indicate, either expressly or by clear implication, that the arbitration clause would not survive termination of the Agreement.

B.

Fort Pitt also argues that the prolonged strike by the Union distinguishes this case from *Nolde* and dictates that Fort Pitt should not be compelled to arbitrate these grievances. Fort Pitt bases this argument on the theory

that the no-strike clause is the quid pro quo for the agreement to arbitrate. *See, e.g., Gateway Coal Co. v. UMW*, 414 U.S. 368, 382 (1974); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957). Fort Pitt contends that arbitration is the preferred method for settling disputes *in lieu of* resort by a union to economic force via strike. Because the Union used its strongest economic weapon, the strike, Fort Pitt argues that it no longer should be bound by the arbitration clause.

This substantial argument brings into focus the difficulty of reconciling the rationale of *Nolde* with those cases that hold that a federal court may enjoin a strike under section 301 on the condition that the employer submit to arbitration over the grievance in question. *See, e.g., Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970). If the arbitration clause survives termination under *Nolde* and the coterminous no-strike clause does not, the employer remains bound to arbitrate, although it is deprived, in part at least, of the consideration flowing to it from its agreement to arbitrate, *i.e.* the no-strike clause.[2]

Under the circumstances of this case, however, resolution of this difficult question is not necessary. The premise underlying Fort Pitt's argument is that the Union, by striking, "demonstrated that the [1975 Agreement] no longer constrained the Union to settle disputes only by arbitration, and, therefore, the Union waived whatever right it may have had to arbitrate this dispute after the expiration of the contract." Therefore, Fort Pitt argues that it should not be compelled to fulfill its con-

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2. The National Labor Relations Board recently confronted this problem and it held that the no-strike clause survives contract termination "to the [same] extent as the duty to arbitrate over issues created by or arising out of the expired contract." *Goya Foods, Inc.*, 238 N.L.R.B. No. 204, 1978-1979 NLRB Dec. (CCH) ¶15,078 (Sept. 29, 1978). The Board reasoned that it would be anomalous to subject an employer to economic pressure while still requiring it to arbitrate the grievance over which the employees were striking.

comitant promise to arbitrate. If, however, the Union's strike did not violate the no-strike clause—assuming for the moment that the clause survived contract expiration —then Fort Pitt's argument is not persuasive. Fort Pitt did not address, either on this appeal or before the district court, this crucial point: Whether the Union's strike in this case would have violated the no-strike clause if it had survived contract expiration. Instead, Fort Pitt seems to rely on the argument that the Union, by engaging in an economic strike in support of its bargaining position, waived its right to compel arbitration, regardless of whether the no-strike clause was intended to reach such a strike. We cannot accept this broad waiver argument. In our view, under the quid pro quo theory, the Union's strike altered Fort Pitt's duty to arbitrate the grievances arising after the expiration of the Agreement only if the strike was one forbidden by the no-strike clause. Therefore, we must examine both the subject matter of the strike and the no-strike clause to determine whether that clause was intended to prohibit the type of strike engaged in by the Union.

The Union went on strike before the six grievances that it seeks to arbitrate arose. The strike was a lawful strike in support of the Union's bargaining position, permissible under the 1975 Agreement[3] and protected under the National Labor Relations Act. During the course of bargaining for a new agreement, the Union and Fort Pitt disagreed over including provisions that would provide for obligations and duties similar to those that the Union alleges Fort Pitt breached under the 1975 Agreement. However, the Union's strike in support of its bargaining position on these issues cannot be characterized as a strike over the grievances it now seeks to arbitrate, *i.e.* Fort Pitt's failure to give employees rights that allegedly accrued under the 1975 Agreement. Because the

3. Fort Pitt has not claimed that the Union failed to comply with ¶ 144, which permits the Union's strike. *See* note 1 *supra* and accompanying text.

Union did not strike over issues that it was required to arbitrate, the Union's strike did not violate the no-strike clause unless the parties intended that the no-strike clause encompass strikes over nonarbitrable subjects, and that it prohibit strikes in support of the Union's bargaining position while bargaining over terms to be included in a new collective bargaining agreement.

In interpreting the breadth of the no-strike clause, we are aided by the notion of coterminous interpretation, which is based on the theory that the no-strike clause is the quid pro quo for the agreement to arbitrate. Under coterminous interpretation, if the subject matter of a strike is arbitrable, then the strike violates the no-strike clause. This theory was developed largely in the area of implied no-strike obligations. *See, e.g., United States Steel Corp. v. UMW*, 548 F.2d 67 (3d Cir. 1976), *cert. denied*, 431 U.S. 968 (1977). However, recently we held that the quid pro quo rationale that underlies coterminous interpretation applies when the collective bargaining agreement contains an express no-strike clause as well as when the obligation not to strike is implied from the arbitration clause. *See Delaware Coca-Cola Bottling Co. v. General Teamster Local* 326, 624 F.2d 1182 (3d Cir. 1980) (holding that a sympathy strike does not violate the no-strike clause because the union was not striking over an arbitrable issue).

Coterminous interpretation must be applied to the facts in each case. *See, e.g., Gateway Coal Co.*, 414 U.S. at 382. The no-strike clause in the 1975 Agreement is broadly worded. It provides that:

> [A]n interruption or impeding of work, stoppage or strike on the part of the Union or a lockout on the part of the Company, shall be a violation of this Agreement, and . . . under no circumstances shall the parties . . . *discuss the grievances in question or any other grievances while the work interruption . . . is in effect.*

(Emphasis added). In *Delaware Coca-Cola*, however, we noted that a "broadly worded no-strike clause does not waive the right to strike over nonarbitrable matters that are not covered by the strikers' contract." 624 F.2d at 1187. *See also Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976). In this case, there is no evidence that the Union waived its right to strike in support of its bargaining position when it agreed to the no-strike clause in the 1975 Agreement. The no-strike clause is tied directly to the arbitration clause because it is located within the section entitled "Adjustment of Grievances" along with the arbitration clause, and because it provides for suspension of the duty to arbitrate "the *grievance in question* or any other grievances" during a strike or lockout. (Emphasis added). Moreover, paragraph 144 of the Agreement expressly permits each party to engage in a strike or lockout in support of its bargaining position if no agreement has been reached within sixty days after giving notice.

Therefore, we conclude that Fort Pitt and the Union intended that the obligation not to strike or lockout would be coterminous with the duty to arbitrate, and that the no-strike clause would have no application to the use of economic weapons in support of either party's bargaining position. Because the Union's strike in this case cannot be said to have violated the no-strike clause, we need not decide whether the no-strike clause survives contract termination to the same extent as the arbitration clause. We conclude that the Union's strike, which was not over the grievances it seeks to arbitrate, does not alter Fort Pitt's obligation to arbitrate the grievances that arose after termination of the Agreement.

C.

Fort Pitt's final argument that *Nolde* does not control the disposition of this case centers on its claim that the parties engaged in extensive negotiations and bar-

gained to impasse on the severance-pay provision. First, Fort Pitt argues that the ten-month negotiation period alone creates a different situation from that presented in *Nolde*. However, in *Nolde* the parties had engaged in extensive negotiations before the plant was closed. We do not believe that the result in this case should be different because the negotiations between the Union and Fort Pitt lasted longer than those in *Nolde*. The Union did not delay unreasonably in asserting its claim for arbitration. Although the grievances are based on rights that the Union alleges accrued under the 1975 Agreement, they did not arise until Fort Pitt had closed the plant and subsequently asserted that it had no obligation to comply with certain provisions of the expired Agreement. Therefore, we conclude that the ten-month negotiation period between contract termination and the claim for arbitration does not constitute a sufficient alteration in the relationship between the parties to absolve Fort Pitt of its duty to arbitrate.

Second, Fort Pitt argues that because it bargained to impasse over severance pay, the severance-pay provision in the 1975 Agreement is no longer extant. This argument derives from those cases holding that an employer may act unilaterally after it bargains to impasse in good faith over mandatory subjects to be included in a new collective bargaining agreement. *See, e.g., American Federation of Television & Radio Workers v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). The employer may act unilaterally only if its action is reasonably comprehended within its preimpasse bargaining proposals. *See, e.g., NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949). The unilateral action presumably "breaks" the impasse, and the parties must resume bargaining.

At the outset, we note that it appears that Fort Pitt bases its impasse claim, at least in part, on the negotiations between the parties concerning the effects of the shutdown. To support its argument that the parties had bargained to impasse, Fort Pitt states that "[d]uring the

negotiations *over the effects of the shutdown*," the Union refused to engage in further discussions "*unless and until Fort Pitt agreed to pay the severance pay under the expired contract.*" (Emphasis added). This alleged "impasse" appears to be based on the fact that the Union insisted that Fort Pitt comply with the severance-pay provision of the 1975 Agreement—the very issue that the Union seeks to arbitrate. The Union's insistence, during negotiations concerning the effects of a shutdown, that Fort Pitt give employees certain rights that the Union alleges accrued under the expired agreement should not enable Fort Pitt to avoid arbitrating this issue. Moreover, this "impasse" did not occur in the course of bargaining over mandatory subjects to be included in a collective bargaining agreement; it occurred after the plant was closed.[4] The parties were not attempting to agree on terms to govern their ongoing relationship, but were trying to settle disputes over the effect of the termination of their employment relationship.

Even if we assume that the parties did bargain to impasse during the negotiations for a new collective bargaining agreement before the plant was closed, this fact alone does not absolve Fort Pitt of its duty to arbitrate the Union's grievances. The Union seeks arbitration of these claims because it believes that the applicable provisions of the 1975 Agreement provided for the accrual of certain rights even though they might not be realized until after the Agreement had expired. There is no reason why the parties could not have agreed to such an arrangement. *See John Wiley & Sons v. Livingston*, 376

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4. We do not mean to imply that it is not mandatory that an employer bargain with a Union over the effects of a shutdown. We merely conclude that an "impasse" reached during these negotiations, which is based on differing interpretations of rights allegedly accrued under an expired agreement, does not allow an employer to impose unilaterally its interpretation of that agreement.

U.S. 543, 555 (1964). Although we express no view on the merits of the Union's interpretation of the 1975 Agreement, we note that the fact that the parties bargained to impasse over provisions that would have been included in a new collective bargaining agreement does not necessarily deprive employees of rights that have accrued under the expired agreement. Therefore we conclude that the arbitrator should settle the dispute between the Union and Fort Pitt over the meaning of the provisions of the 1975 Agreement and its applicability to the present situation.

Finally, we note that this case does not involve a situation in which the Union, after having been unsuccessful at the bargaining table, attempts to use the surviving arbitration clause either to negotiate a new agreement or to interfere with the employer's right to act unilaterally after bargaining to impasse in good faith in the course of an ongoing employment relationship.[5] In this case, when the parties reached impasse, Fort Pitt lawfully elected to close its plant rather than to impose unilateral terms and continue good faith bargaining. It was this election to close the plant, coupled with Fort Pitt's interpretation of the applicability of the 1975

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5. This case therefore is distinguishable from *Washington-Baltimore Newspaper Guild Local 35 v. Washington Post Co.*, 85 Lab. Cas. (CCH) ¶11,243 (D.D.C. April 4, 1979). In *Washington-Baltimore Newspaper Guild*, the district court had ordered arbitration of certain grievances one year after the contract had expired. At that time, the union did not claim arbitration for other issues, *i.e.* dues checkoff, union security, unilateral interim wage increases made after impasse, and contributions to the health and welfare fund, but elected to "raise these issues at the bargaining table and before the NLRB." *Id.* at 20,886. The union was unsuccessful in bargaining and before the Board, and sought to invoke the arbitration clause as to these issues three years after the contract had expired. The court denied arbitration, reasoning that "[t]o accept plaintiff's contention that these issues are now a proper subject of arbitration would be to impose a self-perpetuating system of arbitration in place of normal collective bargaining." *Id.*

Agreement, that gave rise to these grievances. Under these circumstances, we hold that the proper forum for the resolution of this dispute over the meaning of the 1975 Agreement is the arbitral forum chosen by the parties under that Agreement. The arbitrator will determine the meaning of the disputed provisions of the 1975 Agreement and the effect of the plant shutdown on them in light of the fully developed facts. *See Local 595, International Association of Machinists v. Howe Sound Co.*, 350 F. 2d 508 (3d Cir. 1965).

III.

Fort Pitt also contends that, even if the arbitration clause survives expiration of the agreement, each of the Union's six grievances is nonarbitrable. Fort Pitt appears to argue both that each grievance is nonarbitrable as a matter of law, and that genuine issues of material fact exist so as to preclude the granting of summary judgment. When deciding a claim for arbitration under section 301, we must adhere to the congressional policy favoring arbitration. We should not deny an order to arbitrate a particular grievance "unless it may be said *with positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 582-83 (1960) (emphasis added), *quoted in Westinghouse Broadcasting Co. v. Local 804, International Alliance of Theatrical Stage Employees*, 616 F.2d 97, 100 (3d Cir. 1980).

Fort Pitt's claim that the severance-pay dispute is nonarbitrable is based on its argument that the bargaining impasse over whether to include a similar provision in a new collective bargaining agreement relieved it of any obligation to arbitrate claims under the severance-pay provision of the 1975 Agreement. For the reasons stated in the above secton, we reject this argument.

Fort Pitt claims that it should not be compelled to arbitrate the Union's claim for vacation benefits because the Union litigated the withholding of vacation pay as an unfair labor practice before the National Labor Relations Board, and the Board found it to violate both section 8(a)(1) and section 8(a)(3) of the National Labor Relations Act. The Board's decision is presently pending before the United States Court of Appeals for the Ninth Circuit. Fort Pitt argues that the Union, having chosen the Board as the forum for dispute resolution, should be required to follow that action to its fruition. Fort Pitt's argument is misplaced. We agree with the district court that whether particular conduct constitutes an unfair labor practice is a distinct question from whether Fort Pitt must arbitrate a grievance resulting from such conduct. Moreover, the Supreme Court stated in *Carey v. Westinghouse*, 375 U.S. 261, 272 (1964), that "the possibility of a conflict is no barrier to resort to a tribunal other than the Board." As a result, the district court had jurisdiction to compel Fort Pitt to arbitrate the vacation-pay claim, and we find no error in the district court's holding that Fort Pitt must arbitrate this grievance.

Fort Pitt also argues that the Union's grievances over the cancellation of life insurance for all retirees, the improper deduction of social security benefits from pension benefits, and the cancellation of insurance benefits to all employees retiring after March 3, 1978, are subject only to the more narrow grievance and arbitration provisions of the Pension Plan.[6] However, the broad arbitration clause of the 1975 Agreement covers "any request or complaint," and does not purport to exclude disputes

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6. The grievance procedures under the Pension Plan allow for grievances only over issues relating to years of continuous service, the age of applicant, and the existence of a permanent incapacity, and allow the grievant to invoke the grievance-arbitration procedures of the 1975 Agreement at Step Four (arbitration before impartial umpire).

over pension benefits. The pension and insurance benefits are alluded to in the 1975 Agreement, and thus arguably are incorporated by reference. *See Westinghouse Broadcasting Co.*, 616 F.2d 97. Under these circumstances, we cannot say "with positive assurance" that these claims are not arbitrable under the 1975 Agreement.

Moreover, the grievance procedure of the Pension Plan does not require employees with the specified types of grievances to pursue the first three steps of the grievance-arbitration procedure outlined in the 1975 Agreement. Therefore, the Pension Plan's arbitration clause arguably is not intended to exclude arbitration of other claims under the arbitration clause of the 1975 Agreement, but only to allow expedited grievance procedures for those limited issues. Fort Pitt's further claim that the cancellation of insurance benefits to employees retiring after March 3, 1978 is nonarbitrable because the 1975 Agreement only covers employees retiring during the life of the Agreement goes to the merits of the dispute and not to its arbitrability. Therefore, we agree with the district court that these disputes are subject to arbitration.

Finally, Fort Pitt's claim that the grievance over the SUB benefits is nonarbitrable because there is no SUB Plan also must be rejected. We agree with the district court that this argument goes to the merits of the dispute and not to its arbitrability. The 1975 Agreement refers to SUB benefits, and the Union and Fort Pitt disagree over whether such benefits exist. We conclude that the arbitrator should resolve this dispute.

We conclude that the district court did not err in ordering arbitration on the Union's motion for summary judgment. The issues of fact that Fort Pitt argues preclude summary judgment go to the merits of the six grievances and not to their arbitrability. Therefore, we hold that the district court was correct in its determination that each of the six grievances filed by the Union is

subject to the broad arbitration clause of the 1975 Agreement.

IV.

We conclude that the parties to the 1975 Agreement did not provide for the termination of the arbitration clause at the expiration of the Agreement, either expressly or by clear implication. Further, neither the fact that the Union engaged in a lawful strike in support of its bargaining position at contract termination, nor the fact that the parties engaged in extensive negotiations allegedly resulting in impasse on certain issues, relieves Fort Pitt of its duty to arbitrate the Union's six grievances. Finally, we find that each of the six grievances filed by the Union is arbitrable under the 1975 Agreement.

V.

The order of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STEELWORKERS OF AMERICA, AFL-CIO; and JAMES GARRY, QUINTO DELISSIO, PATRICK McGHEN and ERNEST A. OBLACK on behalf of themselves and others similarly situated, *Plaintiffs,* vs. FORT PITT STEEL CASTING, DIVISION OF CONVAL-PENN, INC., DIVISION OF CONVAL CORPORATION, and JAMES P. SPRESSER as Pension Board Member, et al, *Defendants.*	Civil Action 79-1254

ORDER OF COURT

AND NOW, this 19th day of February, 1980, in accordance with the accompanying opinion,

IT IS ORDERED that the motion of plaintiffs, United Steelworkers of America, AFL-CIO; and James Garry, Quinto Delissio, Patrick McGhen and Ernest A. Oblack on behalf of themselves and others similarly situated, for summary judgment be and hereby is granted.

IT IS ORDERED that the motion of defendant, Fort Pitt Steel Casting, Division of Conval-Penn, Inc., and James P. Spresser as Pension Board Member, et al, for summary judgment be and hereby is denied.

DONALD E. ZIEGLER
United States District Judge

cc: Frank J. Lucchino, Esq.
Rudolph L. Milasich, Jr., Esq.
Henry J. Wallace, Esq.
Rody P. Biggert, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STEELWORKERS OF AMERICA, AFL-CIO; and JAMES GARRY, QUINTO DELISSIO, PATRICK McGHEN and ERNEST A. OBLACK on behalf of themselves and others similarly situated, *Plaintiffs,* vs. FORT PITT STEEL CASTING, DIVISION OF CONVAL-PENN, INC., DIVISION OF CONVAL CORPORATION, and JAMES P. SPRESSER as Pension Board Member, et al., *Defendants.*	Civil Action 79-1254

OPINION

Ziegler, District Judge

I. *History of Case*

This is a civil action to compel arbitration of certain grievances. Jurisdiction is predicated on § 301 of the Labor Management Relations Act. 29 U.S.C. § 185.

Plaintiffs, the United Steelworkers of America, and others, (the Union) and defendant, Fort Pitt Steel Casting (the Company), executed a three-year collective bargaining agreement (the Basic Agreement) on March 3, 1975. The Basic Agreement expired on March 3, 1978, and the Union commenced a lawful work stoppage.[1] Section 9 of the Basic

[1] The history of this long and arduous labor dispute is detailed in *United Steelworkers of America* v. *Fort Pitt Steel Casting,* 598 F.2d 1273 (3d Cir. 1979).

Agreement, entitled "Adjustment of Grievances," provides that the grievance procedures shall culminate, if necessary, in binding arbitration[2] and shall apply to "[a]ny [employee] request or complaint."[3]

On August 17, 1977, the Union and the Company entered into a Pension Agreement.[4] Section 7.1 of that Agreement, entitled "Subject Matters of Appeal," provides:

> If during the term of the Pension Agreement, any difference shall arise between any Employee who shall be an applicant to become a Pensioner hereunder and the Company or the Pension Board as to (a) The number of years of Continuous Service of such applicant in the employ of the Company; or (b) the age of such applicant; or (c) whether an applicant became permanently incapacitated through one of the excluded causes set forth in Section 1.13(b); such difference may be taken up by the applicant as a grievance in accordance with the applicable provisons [sic] of the Basic Agreement, beginning with Step 4.

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[2] Basic Agreement at ¶ 98. That paragraph provides:

> Step 4: In the event the dispute shall not have been satisfactorily settled, the matter shall then be appealed to an impartial umpire . . . . The decision of the umpire shall be final.

[3] *Id.* ¶ 91. That paragraph provides:

> Any employee who believes that he has a justifiable request or complaint may discuss the request or complaint with his foreman, with or without the grievance committeeman being present, as he may elect, in an attempt to settle same. Any request or complaint settled between the employee and the foreman, without the committeeman present shall not set aside any provisions of the Basic Agreement.
>
> Any such request or complaint not disposed of within five (5) days and filed in writing, on a grievance form furnished by the Company as later set forth herein shall constitute a grievance within the meaning of this Section.

[4] *See* Exhibit A to affidavit of Allan Gunn.

In January of 1979, the Union filed six separate grievances on behalf of certain employees. The grievances are numbered 600, 601, 603, 604, 605 and 606, and were filed in accordance with the procedures established by the collective bargaining agreement. On February 13, 1979, the Company informed the Union that, in its judgment, the grievances were not subject to arbitration under the Basic Agreement.[5]

Presently before the court is the motion of plaintiffs for summary judgment on all six grievances and the cross-motion of the Company for similar relief as to all grievances except No. 605. For the reasons set forth herein, the motion of the Union will be granted and the Company's motion will be denied.

II. *The Grievances*

The grievances which the Union seeks to arbitrate are as follows: (1) Nos. 600 and 601 allege that the Company improperly deducted Social Security benefits from employee pensions, and also discontinued life insurance coverage provided under the Basic and Pension Agreements; (2) No. 603 alleges that an erroneous interpretation of the Basic and Pension Agreements by the Company has resulted in the cancellation of life insurance coverage for persons retiring after March 3, 1978; (3) No. 604 alleges that the Company improperly withheld earned vacation payments during the work stoppage which began in March of 1978; (4) No. 605 alleges the improper withholding of severance pay due and owing under the Basic Agreement; and (5) No. 606 alleges the Company improperly withheld and distributed funds under a supplemental unemployment benefit plan.

III. *Discussion*

The issue of arbitrability of grievances must be decided by the court and not by an arbitrator. *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). In

[5] *See* Exhibit B to plaintiff's complaint.

performing this jurisprudential function, a court must always be cognizant of the national labor policy favoring arbitration of labor disputes. *See* 29 U.S.C. §§ 171(a), 173(d). Arbitration clauses should be construed broadly for there is "a strong presumption favoring arbitrability." *Nolde Bros., Inc.* v. *Local No. 358, Bakery Workers,* 430 U.S. 243, 254 (1977). As the Supreme Court has explained:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.
>
> • • •
>
> In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail. . . .

Steelworkers v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582-85 (1960).

These teachings apply with equal force although the dispute may arise following the termination of a collective bargaining agreement. As the Supreme Court stated in *Nolde Bros.:*

> The parties must be deemed to have been conscious of this policy when they agreed to resolve their contractual differences through arbitration. Consequently, the parties' failure to exclude from arbitrability contract disputes arising after termination, far from manifesting an intent to have arbitration obligations cease with the agreement, affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship. In short, where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication.

430 U.S. at 255.

Also, in determining arbitrability, the court must not assess the merits of a grievance, *Id.* at 249, or attempt to "determine whether there is particular language in the written instrument to support [the grievance]." *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 568 (1960).

The instant arbitration clause is broad and all-inclusive. It encompasses "any request or complaint" and contains no limitations. In characterizing such a clause, the Court of Appeals for the Second Circuit recently observed:

> If a court finds that the parties have agreed to submit to arbitration disputes 'of any nature or character,' or simply 'any and all disputes,' all questions, including those regarding termination, will be properly consigned to the arbitrator: 'With that finding the court will have exhausted its function, except to order the reluctant party to arbitration.' (citations omitted). In dealing with a narrower arbitration clause, a court's inquiry is not so circumscribed, and it will be proper to consider whether the conduct in issue is on its face within the purview of the clause.

Rochdale Village, Inc. v. *Public Service Employees Union, Local No. 80*, 605 F.2d 1290, 1295 (2d Cir. 1979).

The presence of such a broad and all-inclusive clause serves to limit the scope of this court's inquiry. "[O]nce a court finds that, as here, the parties are subject to an agreement to arbitrate, and that agreement extends to 'any difference' between them . . .," it is required to consign the case to arbitration. *Operating Engineers* v. *Flair Builders, Inc.*, 406 U.S. 487, 491 (1972).

The Company raises several arguments in an attempt to avoid the broad sweep of the arbitration clause of the Basic Agreement. With respect to numbers 600, 601 and 603, it contends that these grievances concern pension disputes. Under § 7.1 of the Pension Agreement, only pension griev-

ances relating to years of continuous service, age of the applicant, and the existence of a permanent incapacity are arbitrable. Since these grievances are unrelated to those issues, the Company argues for non-arbitrability. We disagree.

Standing alone the language of § 7.1 of the Pension Agreement supports defendant's conclusion. However, that language must be construed in conjunction with the language of the Basic Agreement. Under the Basic Agreement, numbers 600, 601 and 603 clearly are arbitrable. Faced with a direct conflict between contractual provisions, we are unable to conclude with "positive assurance" that the parties did not intend to submit these disputes to arbitration. *Steelworkers* v. *Warrior & Gulf Navigation Co. supra* at 582.

Our conclusion is buttressed by *Bressette* v. *International Tale Co., Inc.*, 527 F.2d 211 (2d Cir. 1975). In *Bressette*, the collective bargaining agreement contained a broad arbitration clause, without limitation or exclusions. *Id.* at 215. In a subsequent section of the agreement, however, the contract provided that all disputes concerning pensions were not subject to the arbitration provisions of the agreement. *Id.* at 216. Despite this exclusionary provision, the Court of Appeals held that all such grievances were arbitrable. The court stated:

> At the very least, there is a significant question as to whether the parties meant to exclude disputes over this subsection from arbitration under the provisions of the collective bargaining agreement. Since, as stated in *Warrior & Gulf*, supra, 363 U.S. at 583, 80 S.Ct. at 1353, 'Doubts should be resolved in favor of coverage,' we believe that this claim should be arbitrated along with the others raised in this case.

Id. at 216.

In our judgment, the language of § 7.1 of the Pension Agreement on which the Company here relies is not as

definitive as the exclusionary language found to be insufficient in *Bressette*. Only the most "forceful evidence of a purpose to exclude [a] claim from arbitration can prevail" and all "doubts should be resolved in favor of coverage." *Steelworkers* v. *Warrior & Gulf Navigation Co., supra.* If the Company had included a specific provision in the arbitration section of the Basic Agreement excluding pension disputes from arbitration, then these grievances would not be arbitrable. Absent such guidance, we hold that grievance numbers 600, 601 and 603 are arbitrable.

Grievance number 604 alleges that the Company improperly withheld vacation payments to employees during the work stoppage of March 3, 1978. This allegation was litigated as an unfair labor practice before National Labor Relations Board and the Board found a violation of Section 8(a)(3) and (1) of the *Act.*[6] The matter is presently pending before the Court of Appeals for the Ninth Circuit pursuant to Sections 10(e) and (f) of the Act, and the Company contends that this court lacks subject matter jurisdiction to compel arbitration while the matter is before that court.

The argument is vacuous. Section 10(e) of the National Labor Relations Act empowers the Board to petition the appropriate court of appeals for enforcement of its orders. 29 U.S.C. § 160(e). It also describes the procedures for judicial review and defines its scope.[7] Defendant attempts

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[6] See Exhibit A to affidavit of Rody P. Biggert.

[7] 29 U.S.C. § 160(e) provides:

> The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the en-

to isolate the following language of § 10(e) in support of its position:

> forcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

> Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

29 U.S.C. § 160(e).

Section 10(e) does not grant exclusive jurisdiction to a court of appeals over all issues relating to the subject matter of an unfair labor practice. Rather, "[u]pon the filing of [a petition for review], the court . . . shall have jurisdiction of the proceeding and of the question determined therein." 29 U.S.C. § 160(e); *See, Ford Motor Co.* v. *National Labor Relations Board,* 305 U.S. 364, 368 (1938). Thus, the Court of Appeals for the Ninth Circuit has exclusive jurisdiction to "set aside or modify in whole or in part" the Board's finding of a violative labor practice. *Id,* at 370. It does not have exclusive jurisdiction over an action such as here to compel arbitration. Whether the conduct complained of in grievance number 604 constitutes an unfair labor practice is a distinct question from whether the Company must arbitrate the grievance. We hold that grievance number 604 is arbitrable under the Basic Agreement.

The Company next contends that a question of fact exists concerning the arbitrability of the severance pay dispute asserted in grievance number 605, since the severance pay clause expired with the contract on March 3, 1978. Secondly, it argues that the following expiration of the contract on March 3, 1978, the parties bargained to an impasse over a new severance pay clause, and the Company was permitted

to unilaterally adopt a different severance pay provision. Hence, the Company urges that the provision in the old contract under which the Union claims severance pay is no longer extant. We disagree.

The Supreme Court has held that the duty to arbitrate survives the termination of a contract, *Nolde Bros., Inc.* v. *Local No. 358, Bakery Workers, supra.* Thus, the expiration of the contract on March 3, 1978, can serve as no refuge here. The second argument relates to the merits of the grievance, not to its arbitrability. In *Becker Autoradio U.S.A., Inc.* v. *Becker Autoradiowerk,* 585 F.2d 39 (3rd Cir. 1978), the Court of Appeals refused to decide whether the parties had agreed to an alleged subsequent oral agreement to extend the contract, holding that such issues are "reserved for the arbitrator." *Id.* at 46. Similarly, in *Controlled Sanitation Corp.* v. *District 128, International Association of Machinists and Aerospace Workers,* 524 F.2d 1324 (3d Cir. 1975), *cert. denied,* 424 U.S. 915 (1976), the court held that issues relating to a union's alleged repudiation of an arbitration agreement must be reserved for the arbitrator. We hold that grievance number 605 is subject to arbitration under the Basic Agreement.

Finally, the Company contends that grievance number 606 is not arbitrable, since the supplemental unemployment benefit agreement relied on by the Union does not exist. This argument again goes to the merits of plaintiff's grievance and does not affect its arbitrability. Accordingly, we hold that grievance number 606 is also arbitrable.

In sum, we hold that all six grievances filed by the Union are arbitrable and the Company will be ordered to comply with the grievance and arbitration procedures of the collective bargaining agreement. Plaintiffs' motion for summary

judgment will be granted and defendant's cross-motion for judgment will be denied.

An appropriate order will follow.

/s/ DONALD E. ZIEGLER
DONALD E. ZIEGLER
United States District Judge

DATED: February 19, 1980

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APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 80-1431

UNITED STEELWORKERS OF AMERICA, AFL-CIO; and JAMES GARRY, QUINTO DELISSIO, PATRICK McGHEN, and ERNEST A. OBLACK, on behalf of themselves and others similarly situated

vs.

FORT PITT STEEL CASTING DIVISION-CONVAL-PENN INC., DIVISION OF CONVAL CORPORATION and JAMES P. SPRESSER as Pension Board Member and Agent for Pension Board of Fort Pitt Steel Casting, Division-Conval-Penn Inc., Pension Plan for Members of Local 1406 United Steelworkers of America

FORT PITT STEEL CASTING, DIVISION OF CONVAL-PENN, INC., DIVISION OF CONVAL CORPORATION,

Appellant

(D. C. Civil No. 79-1254)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge* and HIGGINBOTHAM, *Circuit Judge* and MEANOR, *District Judge.*•

• Honorable H. Curtis Meanor, United States District Judge for the District of New Jersey, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on October 9, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed February 19, 1980, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:

/s/ Sally Mrvos
Clerk

November 20, 1980

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1431

UNITED STEEL WORKERS OF AMERICA, AFL-CIO; and JAMES GARRY, QUINTO DELISSIO, PATRICK McGHEN and ERNEST A. OBLACK
on behalf of themselves and others similarly situated

v.

FORT PITT STEEL CASTING, DIVISION OF CONVAL-PENN, INC., DIVISION OF CONVAL CORPORATION, and JAMES P. SPRESSER
as Pension Board Member, et al.,

Appellant

(D.C. Civ. No. 79-1254)
SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, *Circuit Judges,* and MEANOR, *District Judge.**

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ SEITZ
Chief Judge

Dated: December 17, 1980

* Honorable H. Curtis Meanor, United States District Judge for the District of New Jersey, sitting by designation.

APPLICABLE CONTRACT PROVISIONS

Section 19—Prior Agreements

(140) The parties agree that in the event of a labor dispute at the end of termination of this Agreement, the Company will continue hospitalization and insurance benefits. At the end of said dispute, the Company will be reimbursed for payments made on behalf of the employees in payment methods mutually agreed on by the parties.

* * *

(142) The terms of conditions established by this Agreement replace those established by the Agreement of March 3, 1972, as amended, effective as of the date hereof.

Any grievance which as of the date of this Agreement has been presented in writing and is in the process of adjustment under the grievance procedures of the March 3, 1972 Agreement may be continued to be processed under the grievance and arbitration procedures of this Agreement and settled in accordance with the applicable provisions of the applicable prior Agreement, for the period prior to the date of this Agreement and for any period thereafter in accordance with the applicable provisions of this Agreement.

Any grievance filed on or before the date of this Agreement which is based on the occurrence or non-occurrence of an event which arose prior to the date of this Agreement must be a proper subject for a grievance under this Agreement and processed in accordance with the grievance and arbitration procedures of this Agreement. Such grievance shall be settled in accordance with the applicable provisions of the March 3, 1972 Agreement, as amended, for the period prior to the date of this Agreement, and for any period thereafter in accordance with the applicable provisions of this Agreement.